129-65

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~371~~ 101

SYLVESTER C. NOBLE, PLAINTIFF IN ERROR,

vs.

DEFOREST HAMMOND, SURVIVOR OF THE LATE FIRM OF HAMMOND & BURT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

FILED OCTOBER 12, 1885.

B

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OCTOBER TERM, 1887.

No. 371.

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vs.

DEFOREST HAMMOND, SURVIVOR OF THE LATE FIRM OF HAMMOND & BURT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

INDEX.

	Original.	Print.
Writ of error	1	1
Proof of service of citation	5	2
Citation	6	2
Caption	8	3
Transcript from Franklin county court	8	3
Writ of attachment	8	3
Officer's return	11	4
Specifications	12	4
Plea and notice	12	5
Trial, verdict, and judgment	19	7
Defendant's bill of exceptions	20	8
Judgment	28	11
Clerk's certificate	30	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 9, 1888.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Vermont for the county of Franklin, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Vermont for the county of Franklin before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Sylvester C. Noble and Deforrest Hammond and Azro A. Burt, partners doing business under the name and style of Hammond and Burt, whereof said Hammond is survivor by reason of the decease of said Burt pending said cause and before final judgment therein, wherein was drawn in question the construction of a clause of a statute of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under said clause of said statute, a manifest error hath happened to the great damage of the said Sylvester C. Noble, as by his complaint appears,
2 we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1885, in the said Supreme Court to be then and there held, that, the record of proceedings being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 13th day of October, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal Circuit Court, Vermont District, U. S. A.]

B. B. SMALLEY,
Clerk United States Circuit Court, District of Vermont.

Allowed by—

HOMER E. ROYCE,
Chief Judge of the Supreme Court of the State of Vermont.

3 FRANKLIN COUNTY, *ss:*

CLERK'S OFFICE OF THE SUPREME COURT.

A copy of the foregoing writ of error was lodged by the plaintiff in error in this office within ten days after the rendition of the judg-

ment mentioned in the foregoing writ of error and on the first day of December, 1884, for the above-named defendant in error.

Attest: WILBUR P. DAVIS,
Clerk of the Supreme Court of the State of Vermont for the County of Franklin.

4 [Endorsed:] Sylvester C. Noble *vs.* Deforrest Hammond, survivor, &c. Supreme Court of the United States. October term, 1885. Writ of error.

5 STATE OF VERMONT, } *ss:*
Franklin County, }

Fuller C. Smith, being duly sworn, deposes and says that he served the annexed citation upon Deforrest Hammond, personally known to him to be the person mentioned as defendant in the writ of error therein mentioned, at St. Albans, in said county of Franklin, on the first day of December, 1885, by then and there showing to said Hammond the original citation hereto attached and delivering to him a true copy thereof.

FULLER C. SMITH.

At St. Albans, in said county, personally appeared Fuller C. Smith and made solemn oath that the foregoing statement by him subscribed is true this first day of December, 1884.

Witness my hand & official seal this first day of December, 1884.

[Albert P. Cross, Notary Public, Franklin Co., Vermont.]

ALBERT P. CROSS,
Notary Public.

6 UNITED STATES OF AMERICA, *ss:*

To Deforrest Hammond, of Franklin, in the county of Franklin and State of Vermont, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1885, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Vermont for the county of Franklin, wherein Sylvester C. Noble is plaintiff and, you as survivor of the late firm of Hammond and Burt, are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Homer E. Royce, chief judge of the supreme court of the State of Vermont, this first day of December, in the year of our Lord one thousand eight hundred and eighty four.

HOMER E. ROYCE.
Chief Judge of the Supreme Court of the State of Vermont.

7 [Endorsed:] Sylvester C. Noble *vs.* Deforrest Hammond, survivor, &c. Supreme Court of the United States. October term, 1885. Citation on writ of error.

8 Be it remembered that at the term of the honorable supreme court of the State of Vermont begun & holden at Montpelier, in the county of Washington, for the county of Franklin & the State of Vermont, on the 28th day of October, A. D. 1884—present in court: Honorable Homer E. Royce, chief judge; Honorable Timothy P. Redfield, Honorable H. Henry Powers, Honorable Jonathan Ross, Honorable W. G. Veasey, Honorable Russell S. Taft, Honorable John W. Rowell, assistant judges—the court rendered judgment in the following cause, viz:

STATE OF VERMONT, } ss:
Franklin County, }

Supreme Court, Franklin County. January Term, 1882.

S. C. NOBLE *vs.* HAMMOND & BURT.

To any sheriff or constable in the State, Greeting:

By the authority of the State of Vermont you are hereby
9 commanded to *to* attach the goods, chattels, or estate of Sylvester C. Noble, of St. Albans, in the county of Franklin & State of Vermont, to the value of two thousand dollars, & him notify thereof according to law, & for want thereof take his body, if to be found within your precinct, & him safely keep, so that you have to appear before the county court, next to be holden at St. Albans, within & for said county of Franklin, on the second Tuesday of September, A. D. 1878, then & there to answer unto De Forest Hammond, of Franklin, & Asro A. Burt, of Berkshire, in said county, partners doing business under the name & style of Hammond & Burt, in a plea of the case, for that the defendant, at St. Albans, on the first day of June, 1878, was indebted to the plaintiffs in the sum of two thousand dollars for so much money before that time lent & accommodated by the plaintiffs to the defendant at his request, & in like sum before that time paid, laid out, & expended by the plaintiffs for the use of the defendant & at his request, & in the like sum for certain work, labor, care, & diligence of the plaintiffs before that time done & performed & bestowed about the business of the defendant & for the defendant at his request, &
10 for divers materials in & about said work furnished by the plaintiffs at the defendant's request; & also in the like sum for divers goods, wares, & merchandise of the plaintiffs before that time sold & delivered & bargained & sold to the defendant at defendant's request; & also in the like sum for so much money found due from the defendant to the plaintiffs on accounting between them; & in consideration thereof the defendant then & there promised the plaintiffs to pay them the said sum on demand, yet, though often requested, the defendant has not paid the same, but neglects & refuses so to do; all of which is to the damage of the plaintiffs the sum of 1,500 dollars, for the recovery of which, with just costs, the plaintiffs bring suit.

Fail not, but make service & return according to law.

Dated at St. Albans, in the county of Franklin, on the 26th day

of August, in the year of our Lord one thousand eight hundred & seventy-eight.

WILBUR P. DAVIS, *Clerk.*

H. C. Adams recognized to the defendant in the sum of forty dollars as surety for costs of prosecution, as the law directs.

WILBUR P. DAVIS, *Clerk.*

Affidavit filed August 26, 1878, & before the issuing of the writ.

WILBUR P. DAVIS, *Clerk.*

11 *Officer's Return.*

FRANKLIN COUNTY, ST. ALBANS, *August* 29, 1878.

Then served this writ by arresting the body of the within-named respondent, read the same in his hearing, & H. B. Soule became his bail by endorsing his name on the back of this writ as bail thereon, & at defendant's request I delivered to said defendant a like true & attested copy of this writ, with my return thereon endorsed.

Attest: JULIUS HALBERT, *Sheriff.*

Fees:

Travel, 1 mile	10
Arrest & reading	56
One copy	2 00
Taking bail	25
	$2 91

The foregoing cause was duly entered on the docket of the Franklin county court within & for the county of Franklin & State of Vermont at the September term, A. D. 1878, thereof, when the plaintiffs appear in court by their attorneys, Henry C. Adams, Esq., & H. R. Start, Esq.; & the defendant appears in court by his attorneys, Edson, Rand & Cross & Noble & Smith; & the plaintiffs,
12 Oct. 2d, A. D. 1878, file their specifications in this cause as follows:

Plaintiffs' Specifications.

And now the plaintiffs, by their attorneys, H. R. Start & H. C. Adams, come & specify the following as the said plaintiffs' cause of action in said suit, to wit:

To one thousand dollars in money received by the defendant of & from the said plaintiffs, in a fiduciary capacity, on or about the first day of June, A. D. 1877.

H. R. START,
H. C. ADAMS,
Plaintiffs' Attorneys.

Filed Oct. 2, 1878.

Attest: WILBUR P. DAVIS, *Clerk.*

And by order of the court this cause is continued to the April term, A. D. 1879, of said county court. On the 9th day of January, A. D. 1879, the defendant files in said cause his plea & notice as follows, viz:

Defendant's Plea & Notice.

And now comes the said defendant, by Albert T. Cross, his attorney, & defends the wrong & injury when, &c., & says that he did not assume & promise in manner & form as the plaintiffs in
13 their said declaration have alleged, & thereof puts himself on the country, &c.

By ALBERT P. CROSS,
His Attorney.

And the s'd defendant, agreeably to the statute in such case made & provided, hereby gives notice that he will give evidence of — under his said plea & rely upon, in his defence, the following special matter to wit:

That upon the petition of the Vermont National Bank of St. Albans, Lester C. Hall, & C. H. Baker, creditors of him, the said defendant, duly filed in the district court of the United States for the district of Vermont on the 2d day of November, 1877, & duly served upon him, he, the said defendant, was duly & legally adjudged a bankrupt, agreeably to the laws of the United States in that case made & provided, by said district court, at a session thereof holden at Burlington on the 6th day of November, 1877, & that such proceedings were duly & legally had in the matter of said bankruptcy; that on the 28th day of November, 1877, one John J. Burgess was appointed assignee of said defendant, & all of the estate, both real & personal, of said defendant was assigned to said assignee immediately thereafter, agreeably to the provisions of the United States bankrupt law.

14 That after said defendant was adjudged bankrupt as aforesaid, & on the 14th day of November, 1877, said defendant filed in said court his petition, setting up the matters & things therein stated & praying said court to call a meeting of the creditors of said defendant to consider & act upon an offer of composition to be by him made, agreeably to the provisions of said bankrupt law in that behalf provided, & said court thereupon in due & legal form passed an order in said matter calling a meeting of said creditors for the purpose aforesaid, to be held before L. L. Lawrence, Esq., register in bankruptcy, at his office in Burlington, on the 28th day of November, 1877, at 2 o'clock in the afternoon; and the said defendant & his creditors, due notice of said meeting having been made agreeably to law & the rules of said court, appeared before said register at the time & place aforesaid, and said defendant filed at said meeting with said register a true schedule of all of his property & a true schedule of all of his debts, together with the names & residences of the creditors to whom the same were owing, both of which said schedules were verified by the oath of said defendant, & thereupon submitted himself to examination touching his said estate

& debts, all agreeably to law. And the said defendant, at said meeting, made an offer of composition in due form of law of three
15 cents on the dollar of all of his debts, to be paid in money on or before the time in said offer mentioned, & all of the creditors of said defendant who were present at said meeting voted to accept the composition so offered as aforesaid in full discharge of their debts against said defendant; all which said proceedings at said meeting were had agreeably to law. And the said register having reported to said court in said matter & therein certified the matters & things aforesaid, & that *that* the acceptance & confirmation of said offer of composition was, in the opinion of said register, for the best interest of the creditors of said defendant, which said report & the papers therein referred to was filed in said court on the 30th day of November, 1877, said court, agreeably to the provisions of said bankrupt law, on said 30th day of November, 1877, entered an order in said matter calling a meeting of the creditors of said defendant, to be held before B. B. Smalley, Esq., as special master, at the office of the clerk of said court, on the 8th day of December, 1877, at 2 o'clock in the afternoon, for the purpose of enquiring, on hearing, whether said composition had been accepted & confirmed by the creditors of said defendant as required by said bankrupt law, and said defendant appeared at said meeting & submitted himself to examination in respect of his said
16 debts & property, & there was duly & legally filed at said meeting a resolution confirming said composition so accepted as aforesaid, which resolution of confirmation was signed by said defendant, & by more than two-thirds in number & one-half in value of all of the creditors of said defendant; and the said special master having made his report to said court & therein certified that the said composition had been duly accepted & confirmed by said creditors, as required by law, & that the same was for the best interests of all the creditors of said defendant, which said report, together with said resolution of confirmation & other papers therein referred to, was filed in said court on the 8th day of December, 1877; the said court, on the 12th day of December, 1877, entered a final order in said matter that said resolution be recorded & said statement of assets & debts be filed, which said final order & decree was duly filed in said cause on said 12th day of December, 1877, & said order further provided that upon payment to each creditor named in said composition of the percentage that shall be his due according to the terms of the aforesaid resolution, together with all costs & charges in the case & said bankruptcy proceedings, all further proceedings in bankruptcy should be discontinued & said cause dismissed from the docket of said court, & that the as-
17 signee recovery all the estate to the bankrupt; and said order further provided that said costs be paid by Dec. 18, 1877, & said dividend to creditors by Dec. 27, 1877, & that satisfactory evidence thereof be furnished the court by January 1, 1878; and said order further provided that in case any creditor should refuse to accept the sum due him in accordance with the terms of said order, or if said bankrupt should not be able to consummate said payment by

reason of the remoteness of the residence of any creditor, then the amount due such creditor, with one per cent. added, might be deposited with the clerk of said court, & the same should be a full compliance with the directions of said order; and the defendant hereby refers to said final order & the said several proceedings hereinbefore referred to & brings true copies of the same into court here & make the same a part of this his notice.

And the defendant will further show that the same identical debt upon which this suit is brought & mentioned & set forth in the plaintiffs' declaration & specification accrued long before the defendant was adjudged a bankrupt as aforesaid & was owing & outstanding from the said def't to the plaintiffs at the time of the filing of the petition against the defendant to have him adjudged a bank-
18 rupt as aforesaid, & that said identical debt set forth in the said plaintiffs' declaration & specification in this case was set down & included in the statement aforesaid of the creditors to whom said defendant was owing debts, filed at said meeting for composition & in said court as aforesaid, together with a statement of the names of the said pl'fs & their addresses as the persons to whom said debt was due, all which will appear from the records thereof in said court still remaining & said copies hereinbefore referred to.

And the defendant will further show that he fully complied with said final order agreeably to the terms thereof & made due proof thereof to said court, as will more fully appear from the certificate of the clerk of said court, a true copy of which is hereby referred to & made a part of this notice.

And the defendant will further show that he paid the costs in said matter by Dec. 18, 1877, & that he paid to or deposited with the clerk for each of the creditors mentioned in said composition the amount of the percentage his due, respectively, by Dec. 27, 1877, & made satisfactory proof of said payments by January 1, 1878.

And the def't will further show that he offered to pay the percentage due to the said plaintiffs in respect of ther said debt
19 in said composition proceedings & in this case set forth, to wit, on Dec. 26, 1877, & that the said plaintiffs refused to receive or accept the same, & that the def't thereupon deposited the same, being thirty dollars & sixty cents, with one per cent. added, with the clerk of said U. S. district court for Vermont on, to wit, said 26th day of December, 1877.

By his attorneys, EDSON, RAND & CROSS.

Filed January 9, 1879.

WILBUR P. DAVIS, *Clerk.*

At the April term, A. D. 1879, of the said Franklin county court the parties appeared in court, by their aforesaid respective attorneys, & by order of court this cause is continued from term to term until the April term, A. D. 1880, of said county court, when the parties appear in court, by their aforesaid respective attorneys.

And to try the issue between the parties in said cause said plaintiffs, as well as said def't, put themselves upon the county for trial,

& to try such issue a jury of judicious, disinterested men, inhabitants of said Franklin county, viz., Francis Smith, Wm. Samson, Henry Dunton, George Hunt, Fred. R. Pattee, Edgar Wilder, Franklin C. Deal, Nelson F. Hazard, Wm. Fanchon, Frank M. Northrop, Rob't Fulton, & James B. Dunlon, are duly empanelled & sworn, who, after the proofs & allegations of the parties & the arguments of counsel, return a verdict in favor of the plaintiffs to recover of the defendant the sum of eleven hundred & forty-nine dollars & eighty-three cents damages & their costs of suit, taxed & allowed at the sum of —, & judgment is duly rendered on said verdict for the plaintiffs by the court; and, April 15, 1880, the plaintiffs move the court here to grant them a certified execution against the defendant, which motion is granted by the court; to which the def't excepts, and also to all which proceedings & judgment of the county court the defendant's exceptions allowed, exc'parg-ed, & cause passed to the supreme court on the following bill of exceptions, filed June 8th, A. D. 1880:

Defendant's Exceptions.

This cause was an action of general assumpsit plea, the general issue & notice of special matter, & trial by jury.

It appeared that prior & on the 1st day of October, 1877, the Central Vermont Railroad Company was indebted to the plaintiffs in about the sum of three thousand six hundred dollars; that the plaintiffs resided in Franklin, quite a distance from the offices of the said railroad company; that it was the custom of said railroad company to pay bills of the same kind as that of the plaintiffs, in instalments, when most convenient for said company; that the plaintiffs had other bills against said company prior to this one, & they had experienced considerable difficulty in collecting said bills by reason of the distance they were obliged to come to get the instalments & by reason of said company frequently not being ready when they did come to pay them anything; that the defendant was a dealer in dairy produce at St. Albans; that the plaintiffs requested the defendant, as a matter of accommodation to them, to collect said indebtedness for them of said company by applying to the company frequently for instalments thereon; that the defendant consented to do so; that the defendant was not to receive any consideration or benefit for so doing, but that he undertook said business solely for the accommodation & convenience of the plaintiffs & to save them the trouble & expense of coming to St. Albans personally to collect the instalments from said company; that the plaintiffs called at the office of the defendant, in pursuance of said arrangement, on October 2, 1877, the defendant at the time being out of his office, & made & left for the defendant an order, of which the following is a copy:

ST. ALBANS, VT., *Oct.* 2, 1877.

Central Vermont railroad will please pay to S. C. Noble or order the whole amount due to us.

HAMMOND & BURT.

Immediately after the plaintiffs left the office the defendant came in, &, the order being handed to him, he stepped to the door of the office & called to the plaintiffs, who were then part way across the street on their way to the depot, & asked them what he should do with the money when he had collected it. The plaintiffs testified, & their testimony tended to show, that they then told the defendant "to keep the money until they called for it."

Upon this point the defendant testified that the plaintiffs told him "to keep and use the money until they called for it," or words to that effect. The defendant introduced other evidence tending to show that it was the understanding & intention of the parties that the defendant should be at liberty to use the money.

The defendant presented said order at the office of the treasurer of said railroad company, & on Oct. 3, 1877, collected five hundred dollars, & on Oct. 12, 1877, collected five hundred dollars, & receipted therefor to said company in his own name, on account of said indebtedness of the plaintiffs against said railroad company.

Upon the several days when said sums — received by
23 the defendant he entered the same in his regular cash account and mingled the same with his other money, & used the same and took the same care of the same that he did of his own funds.

The plaintiffs' testimony tended to show that on the 16th day of Oct., 1877, Hammond, one of the plaintiffs, met the defendant on the street in St. Albans & asked him how he got along collecting the money; that the defendant then told him that he had collected five hundred dollars, & at the suggestion of said Hammond he said he would get five hundred dollars more & bring the same & said five hundred dollars up to the plaintiffs at Franklin the following Monday; that the defendant went to Franklin on said Monday, & said Hammond met the defendant & asked him if he had got the money, & defendant told him that it was pay week with the company & he had not been able to get the money for them.

The defendant testified as to said interview on the streets of St. Albans; that Hammond inquired of him how he was getting along collecting the money, & that he told him he had collected some, but he did not remember of Hammond's asking him how much he had collected or of his telling Hammond how much he had collected; that if Hammond asked him the question he was sure he told him he had collected one thousand dollars, & he denied that said Hammond requested him to or that he undertook at said time to bring up
24 to the plaintiffs one thousand dollars of the money collected on the following Monday, & that he had any such conversation with Hammond on said Monday as the plaintiffs' testimony tended to show.

On the 6th day of November, 1877, the defendant was duly adjudged a bankrupt, on the petition of his creditors, by the United States district court for the district of Vermont; and in said bankruptcy the defendant made an offer of composition to his creditors, which was accepted & confirmed by them & the court, & the terms of said composition were duly complied with by the defendant. The

names of the plaintiffs, their residence, & a description of their debts were entered by the defendant on the schedule of debts filed by him before the register of said composition proceedings. All of said bankruptcy proceedings were had in accordance with the United States statutes in such case provided; and said bankruptcy & compositions had the effect to discharge the defendant from the debt sought to be recovered in this cause, unless said debt is of a character or kind excepted from the operation of such discharge by the provision of said bankrupt law.

The plaintiffs did not accept of said offer or consent to said composition, & did not accept of the money tendered pursuant to said composition proceedings, & the same was deposited in the bankrupt court as the law directs.

25 The defendant offered to show that the defendant was sending produce to a Mr. Mitchell, of Boston, & had sent almost entirely to him; that there was a large number of Mitchell's acceptances at that time outstanding on one, two, & three months' time; that Noble, the defendant, had no suspicion that Mitchell was going to fail, but at the time Mitchell failed he was indebted to him nineteen or twenty thousand dollars, taking these acceptances & other papers & by reason of that failure of Mitchell's the defendant failed; it involved him so largely that he failed. So that before the failure of Mitchell was announced to the defendant, on the 26th day of Oct., 1877, by telegraph from Boston, he had no expectation he was going to suffer any loss from any source, & he had used this money; that this defendant's account was kept by the Vermont National Bank, through which bank he made drafts to Mitchell, of Boston, who accepted them; that by reason of the failure of Mitchell these drafts came back to the account, which rendered the account there very largely overdrawn, & this money in question which went into his cash & bank account generally, being a part of his assets, he could not separate it from any other part of his cash; and the defendant claimed that this testimony would show there was no fraud or want of good faith on his part in using the money in question.

26 To this testimony the plaintiffs objected & the same was excluded by the court; to which the defendant excepted. There was no evidence tending to show an actual fraud or any fraudulent intent in the defendant's mingling the money with his own & using it.

After the evidence was closed the defendant moved that the court order a verdict for the defendant, which motion was overruled by the court; to which the defendant excepted.

The defendant requested the court to charge the jury that the order delivered by plaintiffs to defendant was evidence tending to show that the defendant had the right to use the money collected thereon until called for by the plaintiffs.

The court refused so to charge & did charge the jury that there was but one question of fact in the case, & that was as to what direction the pl'ffs gave to the defendant when he stepped to the door & asked them what he should do with the money when it was collected, and the court said, "I am disposed to rule & direct you that

if you should find, from a fair balance of the testimony, that that was the direction the plaintiffs gave to Mr. Noble, that when he received the money he was to keep it until they demanded it; that when Noble received the money he received it in a fiduciary character—that is, he received it in trust to hold it in trust for the parties, & that the plaintiffs would be entitled to recover.

27 The court furthermore charged that if the plaintiffs gave the direction to the defendant, with regard to the use of the money, that the defendant's evidence tended to show was given, or if they simply delivered the order to the defendant without any directions as to what was to be done with the money, that the defendant would not have been a receiver of the money in a fiduciary character & the plaintiffs could not recover.

To all which & the charges as given, & the refusal to charge as requested, the defendant excepted. There was verdict for the plaintiffs.

At the time of the rendition of judgment the plaintiffs moved for a certified execution, which was objected to by the def't.

Ojection overruled by the court & certified execution granted; to which the defendant excepted.

Exceptions allowed, execution stayed, & caused passed to supreme court.

HOMER E. ROYCE,
Presiding Judge.

The foregoing cause was duly entered on the docket of this the supreme court, within & for the county of Franklin & State of Vermont, at the January term thereof, A. D. 1881, when the

28 parties appear in court, by their aforesaid respective attorneys, & by order of court this cause is continued to the January term, A. D. 1882, of said supreme court, when the parties appear in court, by their aforesaid respective attorneys, and the court here hear this cause & the arguments of counsel, & having heard them, do order that this cause lie with the court. At the January term, A. D. 1883, of said supreme court the parties to this cause again appear in court, by their aforesaid respective attorneys, & this cause is by the court here ordered to lie with the court. At the January term of said supreme court, A. D. 1884, said parties again appear in court, by their aforesaid respective attorneys, & this cause is by the court here again ordered to lie with the court. On the 30th day of July, A. D. 1884, it is ordered by said supreme court that this cause be reargued at the general term of said supreme court, to be begun & holden at Montpelier, in the county of Washington, for the State of Vermont, on the 28th day of October, A. D. 1884, at which present term of said supreme court the parties appear in court, by their aforesaid respective attorneys, & the death of the plaintiff, Asro A. Burt, being suggested to the court here, the court order that this cause proceed in the name of Deforest Hammond, surviving plaintiff.

And the court here hear this cause & the arguments of coun-

29 sel, & having heard them do consider that the judgment of the county court in this cause be affirmed by this court.

Whereupon the court here render judgment in favor of said Deforest Hammond, surviving plaintiff as aforesaid, to recover of said defendant the sum of fourteen hundred & sixty-seven dollars 18c. damages, & costs of suit, taxed & allowed at sixty & $\frac{95}{100}$ dollars, whereof said plaintiff may have certified execution.

A true record.

Attest: GEORGE T. MOONEY,
Deputy Clerk.

30 STATE OF VERMONT, } ss:
Franklin County, }

I, Wilbur P. Davis, clerk of the supreme court of the State of Vermont for the county of Franklin, do hereby certify that the above & foregoing is a true copy of the record & of all proceedings in the cause in said supreme court between Sylvester C. Noble & Deforest Hammond & Asro A. Burt, partners doing business under the name & style of Hammond & Burt, whereof said Hammond is survivor by reason of the death of said Burt, pending said cause & before final judgment therein, & that no opinion of the court in said cause has been filed in my office, & the above & foregoing is transmitted by me to the Supreme Court of the United States next to be holden at Washington, in the District of Columbia, on the second Monday of October, 1885, as return of the annexed writ of error.

In witness whereof I have hereunto set my hand officially & affixed the seal of said supreme court of Vermont, at St. Albans, in said county, this 14th day of September, A. D. 1885.

[Seal Supreme Court, State of Vermont.]

WILBUR P. DAVIS, *Clerk.*

Endorsed on cover: Vermont Supreme Court. No. 371. Sylvester C. Noble, plaintiff in error, *vs.* De Forest Hammond, survivor of the late firm of Hammond & Burt. Filed October 12, 1885.

No. 101.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1888.

SYLVESTER C. NOBLE,
Plaintiff in Error,

vs.

DEFOREST HAMMOND,
Survivor of the late firm of Hammond & Burt.

In Error to the Supreme Court of the State of Vermont.

BRIEF FOR PLAINTIFF IN ERROR.

No. 101.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1888.

SYLVESTER C. NOBLE,

Plaintiff in Error.

vs.

DEFOREST HAMMOND,

Survivor of the late firm of Hammond & Burt.

In Error to the Supreme Court of the State of Vermont.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

In October, 1877, the defendant in error lived in Franklin, Vermont, a place some miles distant from St. Albans, Vermont, where the plaintiff in error, then a produce dealer, lived and where also was the principal office of the Central Vermont Railroad Company. The latter owed said defendant in error over three thousand dollars in attempting to collect which they had experienced some trouble and expense, by reason of such distance and because said company were in the habit of paying debts of that character in installments when most convenient for it.

Therefore, they requested the plaintiff in error to collect the same for them, and he consented to; so they gave him the following order:—

ST. ALBANS, VT., Oct. 2, 1877.

"Central Vermont Railroad:—

"Will please pay to S. C. Noble, or order, the whole amount due us.

HAMMOND & BURT."

Telling him at the same time to keep any money he should collect until they called for it.

The plaintiff in error "was not to receive any consideration or benefit for so doing, but he undertook said business solely for the convenience and accommodation of the" defendants in error and to save them the trouble etc., etc.

Afterwards on the 3rd day of October he collected on said order $500.00 and October 12th, $500.00 more.

This money he deposited in his bank account as he collected it, the same as he deposited his own funds.

On the 26th of October the plaintiff in error failed.

On the 6th of November he was adjudged a bankrupt on the petition of his creditors.

He subsequently made an offer of composition to his creditors which was duly accepted and confirmed, and complied with.

The record states that "there was no evidence tending to show any actual fraud or any fraudulent intent in the defendant's mingling the money with his own and using it."

Folio 26, p. 10.

After the evidence was closed, the plaintiff in error moved the court to order a verdict in his favor, which motion was denied by the court, and exceptions taken.

Folio, 26, p. 10.

At the trial the plaintiff in error requested the court to charge the jury that the *order itself* was evidence tending to show that it was expected he would keep the money with his own until called for, as stated. The court refused so to charge but did charge the jury that if the defendants in error directed Mr. Noble, when he should receive the money, to keep it until they demanded it, then he, Noble, when he "received the money, received it in a *fiduciary character*."

See record, Folio 26, p. 11.

At the trial the Plaintiff in error offerd to show that he was, at the time of said collection, sending a large amount of produce to one Mitchell, of Boston; and that Mitchell was owing him about $20,000. at that time, that Mitchell failed on the 26th of Oct. 1887, very unexpectedly, as he was supposed to be a man of wealth.

That by reason of Mitchell's failure certain acceptances of Mitchell were returned to the bank in St. Albans unpaid.

And the Plaintiff in error being unable to meet them was compelled to suspend payment; it was claimed that this testimony if received, would show that there was no fraud or want of good faith on his part in depositing the money with his own in bank. This was objected to and excluded by the Court to which an exception was taken.

The record therefore presents this question. Is a business man, who is directed to collect certain money for another, as an accommodation and without compensation, and to keep it until called for, and who having collected it, deposits the same in the bank with his own funds, in good faith and without any actual fraud and without any fraudulent intent, taking the same care thereof that he does of his own, and who before the money is paid over fails, and goes into bankruptcy, guilty of such an act as brings him within the provisions of Sec. 5,117 of the Revised Statutes of the United States, which reads as follows: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged by proceedings in bankruptcy."

The following assignments in error are relied upon:—

1st. The Supreme Court of Vermont erred in affirming the judgment of the County Court and rendering judgment in favor of the defendants in error on the record—and upon said record refusing to reverse said judgment of the County Court, and render judgment thereon for the plaintiff in error.

2nd. The said Supreme Court erred in holding that the debt shown by the record, was created by fraud within the meaning of the said section, 5117.

3rd. The said Supreme Court erred in affirming the decision of the County Court, overruling the motion of the plaintiff in error for a verdict.

4th. The said Supreme Court erred in affirming the decision of the County Court, excluding the evidence offered by the plaintiff in error, to show the circumstances of his unexpected failure as tending to show there was no fraud or want of good faith on his part.

POINTS.

FIRST.

The Supreme Court of Vermont erred in affirming the judgment of the County Court in favor of the Defendants in error on the record—and upon said record refusing to reverse said judgment and render judgment thereon for the plaintiff in error.

By section 1,392 of the Revised Laws of the State of Vermont, it was the duty of the Supreme Court upon the record, "to render such judgment thereon as ought to be rendered."

What judgment ought to have been rendered? The Bankrupt Act of 1841 contained provisions similar to the act of 1867 upon this subject. In the case of Chapman vs. Forsyth, 2 Howard, 202, the action was assumpsit for the proceeds of 150 bales of cotton shipped to and sold by the defendant as agent. The latter converted the money to his own use and pleaded his discharge in bankruptcy. The Court say "if the act embraced such a debt it will be difficult to limit its application. It must include all debts arising from agency and, indeed, all cases where the law implies obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate."

The act speaks of *technical* trusts and not those which the law implies from the contract. "The Court hold that a factor does not come within the meaning of the act."

This decision was approved and held authoritive in construing the act of 1867, in the case of Neal vs. Clark, 95, U. S. 704—(decided in October, 1877).

That case was when an executor sold certain bonds of an estate to the defendant *at a discount* and under such *circumstances* that the Supreme Court of Virginia held that the sale created a *devastavit* and that Neal became a participant in that *devastavit* and thereby was guilty of constructive fraud, though no actual fraud was proved.

After discussing the case of Chapman vs. Forsyth, Supra., approving the rules of construction therein laid down, the Court (Mr. Justice Harlan delivering the opinion) say:—

"A like process of reasoning may be properly employed in construing the corresponding section of the Act of 1867."

Then after mentioning certain rules of construction the court proceeds to say, "Applying these rules to this case, we remark "that, in the section of the law of 1867, which sets forth the "classes of debts which are exempted from the operation of a "discharge in bankruptcy, debts created by fraud are associated "directly with debts created by embezzlement. Such association, "*justifies*, if it does not *imperatively require*, the conclusion that the "fraud, referred to in that section, means *positive fraud or fraud in* "*fact*, involving moral turpitude or intentional wrong, as does "embezzlement; and not implied fraud, or fraud in law, which may "exist without the imputation of bad faith or immorality.

"Such a construction of the statute is consonant with equity, "and consistent with the object and intention of Congress in en- "acting a general law by which the honest citizen, may be relieved "from the burden of hopeless insolvency.

"A different construction would be inconsistent with the lib- "eral spirit which pervades the bankrupt system."

The question again arose in this Court, in Hennequin vs. Clews, 111 U. S. 676.

The Court, speaking through Mr. Justice Bradley, said:— "We have to decide the question whether a discharge in bankruptcy under the Act of 1867, operates to discharge the bankrupt from a debt or obligation which arises from the appropriation to his own use of collateral securities, deposited with him, as security for the payment of money or the performance of a duty, and his failure or refusal to return the same, after the money had been paid or the duty performed. The question, as far as it relates to the principal involved is not a new one.

It came up for consideration under the Bankrupt Act of 1841."

The Court then review the case of Chapman vs. Forsyth, and the case of Neal vs. Clark (supra), and say: "The present "case is not precisely like either; it is very difficult to distinguish "it in principle from a case of commission merchants and factors "failing to account for the proceeds of property committed to "them for sale.

"There is no more—there is not so much—of the character "of trustee, in one who holds collateral security for a debt, as in "one who receives money from the sale of his principal's pro- "perty—money which belongs to his principal alone and not to "him."

The Court further say that the English authorities take a different view from our own on this question, regarding "many transactions as frauds or breaches of trust under their statutes which we do not hold to be such under our bankrupt acts." And further:—

"Perhaps the liberal construction made in favor of the cer- "tificate of discharge in this country, is due to the peculiar "modes and habits of business prevailing among our people. It "is no doubt true as said in Chapman vs. Forsyth, that a con- "struction of the excepting clauses, which would make them "include debts arising *from agency and the like* would leave but few "debts on which the law could operate.

"At all events we think the previous decisions of this Court "and of the State Courts, in the same direction are in accord with "the true spirit and meaning of the acts of Congress, and with the "necessities of business conditions and arrangements."

Both clauses of the section are construed in their application to the facts of the above case.

These authorities seem entirely decisive of this case. Let us examine it.

The debtor was a dealer in produce. He kept a bank account. It must be presumed that he was a man of property, as well as a man of honor, or the creditors would not have requested him to collect the money and keep it until they called for it.

What was he to do with the money? Was he to keep it in his pocket, or in his house, and thereby incur the danger of theft or robbery? He was requested to keep it.

Was it expected that he would bestow more care upon it than he did upon his own funds? The Supreme Court of the State of Vermont, 57th Vt., 193, p. 200, in speaking of the direction to keep the money until they called for it, say "Instead of obeying the "instructions he used the money by mingling it with his own and "depositing it in his own name and to his own credit in the bank.

"He thereby converted it to his own use. By the conversion "and the *unexpected* revulsion in his business the money was lost."

After citing the section of the Bankrupt Act, the Court say: "It is not contended that it was created by embezzlement or the "defendant's defalcation as a public officer. The construction "placed upon the last clause of the section, 'or while acting in "any fiduciary character' by the United States Supreme Court in "Hennequin vs. Clews is that this clause relates back to the "preceding clause, and includes only debts created by defalcation "while acting in a fiduciary character.

"In other words that there must be a trust relation establish-"ed independent of the transaction out of which the indebtedness "arose. The learned judge who delivered the opinion admitted "the construction was contrary to a majority of the decisions of "other courts in regard to this clause of the section, *as well* as to "the decisions of the English Courts in regard to a similar pro-"vision in the English Bankrupt Act. The County Court in its "charge to the jury placed it on the ground that it came within "the *fiduciary clause*, of the above quoted section. *Although this* "*was a technical error*, it was harmless, *if* the verdict of the jury "brings it within the first, or *fraud clause of the section.*

"On the verdict, *it is within this clause under the decision of this* "*Court in Johnson vs. Worden, 47 Vt., and Darling vs. Woodward,* "*54th Vt.*"

It would have been more satisfactory, if the learned judge had cited in support of his decision, federal authorities instead of those of his own Court.

We quote: "In each of these cases, the defendant had con-
" verted to his own use, without the consent of the plaintiff, pro-
" perty which was in his possession, but which he held under the
" contract between him and the plaintiff, as *collateral security* for
" the debt which he owed the plaintiff.

" In Johnson vs. Worden, the property, thus held and con-
" verted, was a yoke of oxen conditionally sold by the plaintiff to
" the defendant, and in Darling vs. Woodward the property was
" twenty-nine sheep, of which the defendant had given the
" plaintiff a bill of sale as collateral security for signing a bank
" note. The Court held that the debts thus created were debts
" created by fraud and not discharged by the respective dis-
" charges of the defendants in bankruptcy." And the Court pro-
ceeds to say: " From the circumstances attending the transactions
" in both cases, it may *well be inferred* that the defendant intended
" no wrong to the plaintiffs, by such sale further than what arises
" from the sale, but supposed they should be able to meet the in-
" debtedness, for the payment of which, the property was pledg-
" ed when it became due."

Now, with all respect to the learned judge, let us apply the case of Hennequin vs. Clews in determining whether the decisions in the Vermont cases of Johnson vs. Worden and Darling vs. Woodward (supra), were sound.

He says, this being a United States statute, "the construction placed upon it by the United States Supreme Court must control."

This Court expressly holds that where one converts bonds which he holds as *collateral security* for the payment of a debt, the discharge is a bar.

This is *precisely* the case of the oxen and sheep.

They were held as *collateral securities* for a debt and were appropriated so that the owners could not get them. Will it change the rule that the collaterals are oxen or sheep and not bonds?

All the transactions were matters of contracts, and the defaults in each, under the act, were breaches of contract.

It is interesting to see how the Supreme Court of Vermont in this case *cling* to the English decisions and how they attempt to escape the effect of the decision in Hennequin vs. Clews, by narrowing that decision to the fiduciary clause of the section, with a narrow construction at that, while asserting that the case at bar falls entirely within the *fraud* clause of the section.

It says that "the County Court committed error in charging the jury that it came within the fiduciary clause," but that "such error was harmless" because the case came *so palpably* within the *fraud* clause. Although the exceptions certify that "there was no evidence tending to show any actual fraud or fradulent intent."

Little consideration could have been given the case of Hennequin vs. Clews, for both the "fraud" clause and the "fiduciary" clause are discussed in their application to the facts of that case—and it is evident the Court regarded it more within the former than the latter clause.

It is a decisive authority. Settling the law applicable to this case.

The learned judge, we believe, was quite mistaken in saying that the Court in Hennequin vs. Clews "admitted that the construction was contrary to a *majority* of the decisions of other Courts."

Quite the contrary—the Court only admitted there had been diversity of decision and gave citations.

Our examination shows the contrary to be the fact.

Hence we have thought it not unimportant to collate some of them—we find but one or two State Courts holding the opposite view at that time, October, 1884.

And it will be noted that some of the authorities supporting our construction are strikingly similar to our case in their facts.

The case of Cronan vs. Cotting, 10th, Mass. 245, decided in 1870, the plaintiff delivered certain securities to the defendant with the directions to collect them, and apply the proceeds, so far as required, to the payment of a debt due an estate and then pay the balance to the plaintiff.

The Court say: "If this constituted a fiduciary relation such as the statute contemplates, it would require an interpretation so broad that almost all pecuniary obligations, especially those required by law, would be included in the exemption. If the phrase "while acting, etc.," be referred to that which immediately precedes, it implies something in the nature of a defalcation

If it be referred to the first branch of the provision, its association with fraud, embezzlement carries the implication of a debt growing out of some fraudulent misappropriation or at least breach of trust.

The debt in this case arose exclusively *out of a single transaction* between the parties.

Its creation involved no other consideration than that of *contract.*

The default consisted in the non-payment of the balance due to the plaintiff.

The debt did not result from, but preceded the default. It is simply a debt by contract, like any other, which results from the rightful possession of money which belongs to another."

After extended review and argument the Court reached the conclusion that the Bankrupt Act of 1841, and that of 1867 are in this regard in effect the same, and that the case of Chapman vs. Forsyth 2, Howard, which construed the former Act, must determine the judicial construction to be placed upon the term "while acting in a fiduciary character" used in the latter Act.

In conclusion they say "we adhere to that construction applicable to the Act of 1867, until the *same Court* shall declare otherwise."

This may be called the pioneer case in the State Court. It was *before* the question had arisen in *this Court*, under the Act of 1867. In 1875, the same Court in Woodward vs. Towne, vol. — In a case where the defendant was sued in action on contract, for money had and received, as attorney for the plaintiff. He plead his discharge in bar.

The opinion was delivered by the Chief Justice, who says: "The clause in the recent Bankrupt Act exempting from the effect of a discharge in bankruptcy, 'debts created while acting in any fudiciary character' is in substance and effect, a re-enactment of the clause in the Bankrupt Act of 1841, which allowed a like exemption to debts created as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, and includes only technical trusts and not trusts implied by law from contracts of agency or bailment."

The Court adds: "The money sued for in this case was received by the defendant not even as attorney at law, but as *Attorney in fact*, under the power executed him by the plaintiffs."

In 1875, the Supreme Court of Ala., vol. 54, p. 378, Woodbury vs. Cade, say: "A debt due a planter from a cotton factor or commission merchant for the proceeds of cotton sold and converted to his own use is barred by the defendant's subsequent discharge in bankruptcy. The reasoning in Cronin vs. Cotting (supra), is received and adopted by the Alabama Court."

In 1875 also, the Supreme Court of Texas, vol. 43, p. 227, McAdoo & Norwood vs. ——, suit was brought against the plaintiff charging gross negligence in failing to collect or return a note in pursuance of a written contract entered into by them. Adopting the same construction, the Court gave effect to their discharge as a complete bar.

In 1880, the Supreme Court of Mississippi, in Breen vs. Chilton, vol. 57, p. 599, the plaintiffs, bankers in the city of Jackson, gave the defendants certain drafts and notes to collect, the defendant collected the paper and appropriated the proceeds to his own use, subsequently becoming bankrupt and sued, interposed his discharge in bankruptcy.

The Court say: "The legal question presented is whether the liability was a fiduciary debt within the meaning of the bankrupt law, and therefore not discharged."

The Court learnedly discuss the phraseology of the Act of 1841 and that of 1867, also the case of Chapman vs. Forsyth, 2 Howard, and the interpretation put upon the Act of 1867, in re 6th of Blatchford, and also the case of Cronin vs. Cutting (supra) and say in the light of the then recent decision of Neal vs. Clark (supra), "it follows that the liability of the defendant was not embraced in the exception as to fiduciary debts and was released by the discharge in bankruptcy."

In 1881 the Supreme Court of Indiana in Dupont vs. Breck, 81, Ind. 271, the plaintiffs charged the defendant with having $2,800 belonging to them, which he, the defendant, unlawfully and fraudulently converted to his own use.

The defendant plead his discharge.

The Court, after extended review, say: "The weight of authority and the *better reason seems to be* that the Act of 1867 in substance and effect is a *re-enactment* of the Act of 1841 in this particular, and therefore to be construed as including this class of fiduciary debts, *technical* trusts only and *not those implied by law from the contract of agency or bailment.*

The Supreme Court of Georgia in Grannis et al vs. Cubbell, Hazelhurst & Co., 71 Georgia, 582, the defendants had received certain bonds for which they gave a receipt agreeing to return them.

On failure to do so, and the defendant's subsequent bankruptcy and discharge the Court says: "It was not a fiduciary debt within meaning of the Bankrupt Act, so as not to be discharged by the defendant's bankruptcy."

About the same time the Supreme Court in Louisana in Upshur vs. Brisco, 37 La. An. P. held to the same construction, overruling the previous decision on reason and authority.

In 1879 the New York Court of Appeals, vol. 77, Hennequin vs. Clews, approving the Massachusetts decision, arrives at the same judicial construction.

In 1880 the Supreme Court of Pennsylvania, vol. 93, Penn. State, Scott vs. Porter, reached the same conclusion.

The defendant had received goods of the plaintiff to sell on commission. After selling the same, he converted the money to his own use, and when sued he plead his discharge in bankruptcy in bar.

The Court held that it was a good defence; and expressly approved of the case of Cronin vs. Cotting, and other cases supporting the view.

It says: "Such a construction is consonant with equity and the intention of Congress."

In Phillips vs. Russell, 42 Me. 360, A intrusted B with his money to take to a distant place to pay A's note, the money B appropriated to his own use; after which B became bankrupt and obtained his discharge.

Held, that B did not act in that fiduciary character contemplated by the act. And that his discharge was a bar to an action for the money.

In the case Gibson vs. Gorman, 44 N. J. L. 325, the defendant, an auctioneer, in anticipation of sale of some property to the plaintiff, received a deposit from him.

The sale fell through because of defect in title.

In an action to recover the money, the Court holds that the language "debts created by the bankrupt while acting in a fiduciary character" applied only "to technical trusts and not to such trusts as are implied by the law, *from mere contracts of agency or bailment.*"

Chiply vs. Frerson, 18 Fla. 639, and Pierce vs. Shipper, 90 Ill. 371, are to the same effect.

Another interesting case is Palmer v. Hussey, 59th. N. Y. 647. also 87th. N. Y. 303.

This was first before the Court in 1874, it was then an appeal from a General Term order denying a motion to vacate an order of arrest.

The papers show that the plaintiff, transferred to the defendant certain U. S. bonds under an agreement by which they were to be returned to the plaintiff on ten days notice.

Afterwards the defendants hypothecated these bonds for a loan, the defendant refused to deliver them to the plaintiff on demand pursuant to the agreement.

The Court held, that it was the defendants duty to return these specific bonds, and that he was bound to keep them under his control, so that, he within the time limited, could return them, and that the defendant, therefore was liable to an act of conversion, and that the order of arrest was properly granted.

The same case after a hearing upon its merits before the Supreme Court, came before the Court of Appeals again in 1882.

The defendant had interposed his discharge of Bankruptcy in bar of the suit. The plaintiff insisted that the case came within the exception of the Bankrupt Act; on two grounds.

1st. That it was a debt of fiduciary capacity.

2nd. By the fraud of the defendant.

We quote from the opinion of the Court: "The averments of the complaint, the findings of the Referee, the facts stated in the affidavits, and those developed upon motion demonstrate very conclusively that the only fiduciary capacity in which *Hussey* was acting when the debt in question was contracted, originated in the fact of his agency and was implied from that relation.

The complaint alleges that he received the bonds "as agent and broker, in a fiduciary capacity" and upon an express written agreement to return them on ten days notice.

The referee finds that they were received in a fiduciary capacity upon the terms of such an agreement.

The affidavits and the evidence show no other or different trust or fiduciary relation than such as may be said always to exist *in a case of agency.*

In every such case there is an element of trust and confidence so that a breach of duty may be said to be a breach of trust, but the agent is never-the-less not a fiduciary within the meaning of the Bankrupt Act.

Upon the question of fraud, the Court says: "The complaint "alleges that the defendant frauduently, and willfully sold, dis- "posed of, and misapplied the bonds."

The referee finds the fact in that identical language.

The Court further says, "What the defendant did was to hypothecate these bonds for loans at a time *when he was, or supposed himself to be perfectly solvent*, and able upon any ten days notice to be able to redeem and restore them; losses came and he was unable to redeem."

"It is quite certain that the fraud is that only which may be implied from the violation of the duty resting upon the defendant, and his contract."

It cannot be anything else, for nothing else was proven.

There was no active, express fraud, but simply one implied from an unjustifiable act.

What he did do was to hypothecate the bonds.

That by itself was wrong only on the peril incurred.

"Done when, and as it was, it cannot be deemed an affirma- "tive fraudulent act.

"There is no possible fraud in the transaction, except that "implied from the conversion."

To some extent, as wa ssaid in Hennequin vs. Clews (Supra) "in *most*, if *not in all cases of conversion*, some element of fraud or "breach of trust exists in a greater or less degree, and if all such "cases were intended to be excepted from the operation of a dis- "charge in bankruptcy, the provisions which discharge debts for "the conversion of personal property would have no force."

The case of Strafford vs. Jones, 97th. N. Y. Rep. page 586 was an action brought to recover damages, for the alleged conversion of 200 shares of N. J. Cen. R. R. Stock.

The defendant set up, as a defence, his discharge in Bankruptcy.

The plaintiff seems to have had dealings with the defendants as stock brokers, in the course of which they bought and sold stocks and gold for him, and he deposited money with them.

On the 1st of July, 1878, they bought on his order, and for his account, two hundred shares of stock of the N. J. Cen. R. R. Company at a cost of $7,800.

On the 23rd. of Aug. 1878, the defendants sold the stock without any authority from the plaintiff, for $6,525, and failed the same day.

"The unauthorized sale of the stock was a conversion, but "did not constitute such a fraud as is contemplated by the Bank-"rupt Act, (Hennequin vs. Clews, 77 N. Y. 427; Palmer vs. Hus-"sey 87 id. 303,)"

In the case of Hayes vs. Nash, 129, Mass. page, 62.

The defendant as a constable of the City of Boston, attached the goods of the plaintiff, upon writ against a third party; when sued for the tort the defendant set up in bar, his discharge in bankruptcy.

It was held to be a good defence to the defendant, for his wrongful taking and conversion, even though it had the effect to exonerate the sureties on the defendants official bond, from liability, for his misfeasance.

The above is quite in conflict with the Vermont cases *Supra*.

To the same effect are the cases of

Chipley vs. Frinson 18 Fla. 639.
Pierce vs. Shippee 90 Ill. 371.

The Courts of last resort in Virginia, Iowa, New Hampshire Rhode Island, have decided in like manner.

We have not been able to examine all the reports of all the States.

The U. S. Cir. Cts. have generally concurred.

In Grover & Baker vs. Clinton 8th. B. R. 312.

The late Mr. Justice Davis sitting.

The Court say, they "regard the decisions under the act of 1841 as binding on the Court in construing the present act.

This was in the Dist. of Wisconsin.

Also—Ousely vs. Cobin et al, 15 B. R. 489.

In Dist. of South Carolina, the defendant sold some goods for the plaintiff, and refused to pay him the proceeds.

The late Chief Justice Waite making the decision says, "The debt was not contracted in a fiduciary capacity as is contemplated by the act of Congress to be excepted from the operation of a discharge in bankruptcy.

See also, to same effect, Wells vs. Lamfrey 16 B. R. 205.

In re Shaifer et al 17 B. R. 116, District of New Jersey.

In re —— vs. Graff 17 B. R. 319 District of Pennsylvania.

In re Roger et al 18 B. R. 252.

In re Smith et al 18 B. R. 24 S. District of New York.

SECOND.

The Supreme Court of Vermont, erred in holding that the debt shown by the record was created by fraud within the meaning of Sec. 5,117 of the Revised Statutes.

In discussing this case in 57th Vt. 1—201, the learned judge says: "His duty was that of bailee *without hire* to keep it."

What then was the measure of his duty?

Another Vermont case, Spooner vs. Mattoon 40th Vt. 300.

The action was assumpsit. The plaintiff and defendant were soldiers in camp, occupying tents ten rods apart.

The plaintiff had considerable money, and fearing it might not be safe with him, had left it with the defendant without expectation of reward, for two nights, and called for it in the morning. He again left it for safe keeping the third night. And the plaintiff not calling for it in the morning, and the defendant being desirous of relieving himself of the care of it, started, before going upon duty, for the tent of the plaintiff with the intention of returning it to him. For the purpose of not exposing it to view, having no pocket large enough to contain it, he placed it inside and between his vest and shirt. On his way, his attention was

diverted, or as he expressed it, he forgot himself, and the pocket book slipped out and was lost.

The Court say: "In a bailment of this nature is bound to exercise only slight diligence, the accommodation is to the bailor, and the entire advantage to him."

"We are unwilling to hold that it shows gross negligence as it is equally consistent with an honest effort on his part to return the plaintiff his money," rendering judgment for the defendant.

Sir William Jones defines duty in bailments *as follows:*

Slight care required where the benefit is for the bailor.

Ordinary care required where the benefit is for the bailor and bailee.

Greatest care required where the benefit is for the bailee.

Fraud can be inferred in cases of *gross neglect only* and not always then.

Applying these well re-organized rules, how can fraud be imputed to the plaintiff in error, when such can arise only from gross neglect and then in exceptional instances only.

The undertaking here called for the exercise of small care. In Hennequin vs. Clews (supra), we observe the bailment was for the benefit of the bailor and bailee and hence required more than slight care—required ordinary care at least.

There was a direct appropriation of the bonds to pay a particular debt.

Here a deposit of the money in his bank account, awaiting the "call for it."

It is noticeable, that the Court does not attempt to distinguish that case, of Chapman vs. Forsyth, from the one at bar.

But labored effort is made to show it is not like the *devastavit* case Neal vs. Clark (supra). It is not the general legal definition of the words "fraud" and "fiduciary character" that is to govern their meaning in this connection.

It is not what they mean when weighed by themselves as simple expressions; but it is to be determined what they mean in

this section of the bankrupt law, looking to what precedes and follows and the intention of the Congress that made them.

If the learned judge, in this case, having premised that the relation of the plaintiff in error to the money was that "of bailee without hire, to keep it" had followed out this fact to its necessary legal result, he would not in the concluding part of his opinion have stigmatized the conduct of plaintiff in error as bearing the same moral quality as the act of a clerk of a corporation who embezzles the corporation funds.

THIRD.

The Supreme Court of Vermont, erred in affirming the decision of the County Court, over-ruling the motion of the plaintiff in error for a verdict.

What we have said under the first and second assignments in error is equally applicable to this.

FOURTH.

The learned Supreme Court erred in affirming the ruling of the County Court excluding the evidence offered by the plaintiff in error, to prove his solvency and the circumstances of his failure, as showing good faith and honesty in his conduct.

In determining whether a transaction comes within the act, the intent of the party is all important.

And herein the evidence offered—that when he collected the money he had ample means, which a few days after was swept away by the unexpected failure of Mitchell who owed him $20,000, was pertinent and should have been admitted.

Record, Folio, 25, p. 10.

This evidence showing his solvency bore directly upon the understanding the parties to the transaction must have had, as to the care to be bestowed.

All which is respectfully submitted.

A. P. CROSS,
E. CURTIS SMITH,
GUY C. NOBLE,
Attys.

*No.*_____

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

SYLVESTER C. NOBLE,
Plaintiff in Error,

vs.

DEFOREST HAMMOND,
Survivor of the late firm of Hammond & Burt.

BRIEF FOR DEFENDANT IN ERROR.

HENRY R. START, Attorney.

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Statement of facts deemed by the defendant in error to be material in determining the questions shown by the record.

On the 3d day of October 1877, the plaintiff in error received of the Central Vermont Railroad Company five hundred dollars for Hammond & Burt; and on the 12th day of October of the same year the further sum of five hundred dollars under instruction (as the jury have found) to keep the money until Hammond & Burt called for it. He used this money in his own business. On the 6th day of November of the same year he was adjudged a bankrupt and subsequently compromised with his creditors under composition proceedings provided for by the United States Statutes. Hammond & Burt did not consent to said composition and did not accept of any money tendered pursuant to said composition proceedings. (See Transcript of Record pages 9 and 10.)

The testimony of the plaintiff in error tended to show that Hammond & Burt told him "*to keep and use the money until they called for it.*" (page 9.)

The testimony of the defendant in error tended to show that the instructions were "*to keep the money until they called for it.*" The Court told the jury if the instructions were such as the testimony of the defendant in error tended to show, he would be entitled to recover, and if the instructions were such as the testimony of the plaintiff in error tended to show, or if no instructions were given, then the defendant in error could not recover. (See pages 10 and 11 of the Record.)

Under these instructions the jury returned a verdict for the defendant in error. (page 11.)

I.

It was decided by this Court in the Case of Wilmot vs. Mudge et. al. 103. U. S. p, 217 that debts are not barred under the Bankrupt Act of 1874 providing for proceedings for composition between a bankrupt and his creditors that were not barred under the original Act of 1867.

II.

The conversion of Hammond & Burt's money created a debt that comes within the exception provided for in Section 517 of the Revised Statutes.

"No debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

The using of the money received from the railroad company by the plaintiff in error was embezzling Hammond & Burt's money.

The People vs. Hennesey, 15th, Wend. 147.
Commonwealth vs. Foster, 107, Mass, 221.

Hammond & Burt entrusted the plaintiff in error with their money under instructions to *keep it until they called for it.* He *used it in his own business.* This use of the money created a debt and created the cause of action in this case, There was no debt, no cause of action until the money was thus used. The use of the money was embezzlement. It was a direct, positive fraud, or fraud in fact. It was an intentional act. An act that placed the money beyond his control, beyond the reach of Hammond & Burt and wrongfully deprived them of their property the moment he so used the money, and was in no way dependent upon subsequent events

to create a cause of action or determine whether there was an intentional wrong, and is clearly distinguishable from the cases of constructive or implied fraud that have been considered by this Court. And the debt thus created was created by fraud.

The Case of Strang et al vs. Bradner et al 114 U. S. p. 552. was an action to recover the amount paid by the plaintiff on certain notes that they had been induced to execute and deliver to the defendants for their use by means of false and fraudulent representations made by Strang, that certain other notes had not and could not be negotiated. To this action the defendants plead their discharge in bankruptcy. His Honor, Justice Harlan, in delivering the opinion of the Court says "If Strang's conduct does not constitute positive fraud or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character." May we not well say, if the conduct of the plaintiff in error in respect to this money does not constitute positive fraud or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character.

In the case of Strang et al vs. Bradner et al the plaintiffs were indirectly deprived of their property. In the case under consideration Hammond and Burt were directly deprived of their property, by a direct intentional act. Can it be said, that the act of the plaintiff in error in using Hammond & Burt's money in his own business without leave, *is not a positive fraud*, and obtaining a note from them by false and fraudulent representations, negotiating the same for money, using the money in his own business *would be positive fraud?* In effect the plaintiff in error in the first case uses Hammond & Burt's money without leave; in the latter case he uses their money with their leave obtained by false and fraudulent representations. It may require more boldness to obtain money by the former method than by the latter. But is the degree of moral turpitude any less?

III.

The statement in the bill of exceptions that there was no evidence tending to show actual fraud or any fraudulent intent in the plaintiff in error, in mingling the money with his own and using it, cannot change the effect of the evidence detailed in the exceptions or the facts found by the jury. The conversion of the money was a fraud. It was embezzling Hammond & Burt's money, and required no other evidence of fraud, or of intent. The act was a fraud and required no evidence to qualify or explain it, and this statement is only the opinion of one judge, who tried the case in the County Court, of the character of the transaction and his opinion is overruled by the decision of the Supreme Court.

The evidence tended to show that Hammond called on the plaintiff in error for the money before his failure, and that he attempted to deceive Hammond in respect to the amount of money he had collected. The plaintiff in error cannot complain because the court made the right of recovery depend upon whether he was instructed to keep the money until Hammond & Burt called for it. The case might have been put upon much broader grounds without injustice to him.

IV.

The exclusion of the testimony, offered to show that one Mitchell failed and its effect upon the business of the plaintiff in error, presents no Federal question.

Mackey vs. Dillon 4 How. 421.

But if this question is to be considered, disconnected from the other questions shown by the record, then we say the evidence was properly excluded. Hammond & Burt had a cause of action

against the plaintiff in error the moment he used their money in his own business. There was no debt until he thus used the money; the fraudulent use of the money created the debt. The debt was a debt created by *fraud* the moment the money was thus used or it was never a debt created by *fraud* and the subsequent failure of Mitchell could not effect the cause of action or the character of the debt.

V.

The motion of the plaintiff in error for a verdict was properly overruled, and there was no error in the charge. The court gave the plaintiff in error the full benefit of all presumptions by instructing the jury that if Hammond & Burt gave the plaintiff in error the instructions his testimony tended to show were given, or if they gave no instructions, then their verdict must be for the plaintiff in error. There was no error in the refusal of the court to instruct the jury that the order was evidence tending to show that the plaintiff in error had a right to use the money. Both parties claimed there were positive instructions given as to the use of this money. The plaintiff in error having admitted that positive instructions were given, the order had no tendency to show what the instructions were.

It is insisted by the defendant in error that however erroneous may have been the instructions of the court to the jury in regard to the weight of evidence, or however erroneous the rulings of the court may have been in admitting or rejecting evidence, such errors cannot be reviewed here. The only question is whether the State court, from what did appear in the trial of this cause as shown by the record, should have rendered a judgment in favor of the plaintiff in error.

Henry R. Ward Attorney
for the Defendant in E[illegible]

Copy of the opinion of the Supreme Court in this case as is reported in the 57 Vt. p. 198.

The opinion of the court was delivered by

Ross. J. The plaintiffs testified that they told the defendant, upon the occasion when they gave him the order on the railroad company, "to keep the money until they called for it." The defendant testified that they told him "to keep and use the money until they called for it." The jury found that the plaintiffs were right in regard to the instruction given by them to the defendant on that occasion. In view of these claims and the verdict, it must be held as settled by the verdict that, under the instructions, the defendant had no right to use the money; but that he was to keep the identical money received from the railroad company on the order of the plaintiffs; that he was to hold the money collected as the property of the plaintiffs. Instead of obeying the instructions, he used the money, by mingling it with his own, and depositing it in his own name, and to his credit in the bank. He thereby converted the plaintiff's property to his own use. By the conversion, and the unexpected revulsion in his business, the money was lost to the plaintiffs. The contention is, whether the indebtedness thus created was discharged by the defendant's composition in bankruptcy. The composition in this respect was just as effectual, and no more so, than a regular discharge in bankruptcy would have been.

Scott vs. Olmstead, 52 Vt. 211.

It is enacted by Sec. 5117 R. S. U. S. ; "No debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy." To avoid the effect of the composition proceedings, it is incumbent upon the plaintiffs to show that the debt which they are seeking to enforce was created in one of the ways named in the above quoted section. It is not contended that it was created by embezzlement or by the defendant's defalcation as a public officer. The construction placed upon the last clause of this section, "or while acting in any fiduciary character," by the United States Supreme Court, in *Hennequin* v. *Clews*, 111 U. S. 676, is that this clause relates back to the pre-

ceding clause, and includes only debts created by defalcation while acting in a fiduciary character; in other words, that there must be a trust relation established independent of the transaction out of which the indebtedness arose. Being an United States statute, the construction placed upon it by the United States Supreme Court is binding upon this court. The learned judge who delivered the opinion admitted that the construction was contrary to a majority of the decisions of other courts in regard to this clause of the section, as well as to the decisions of the English court in regard to a similar provision in the English Bankrupt Act. But the decision finds support from the United States Supreme Court in regard to a similar provision in the Bankrupt Act of 1841. *Chapman* v. *Forsyth*, 2 How. 202. The County Court, in its charge to the jury, placed the case on the ground that it came within the fiduciary clause of the above quoted section. Although this was technical error, it was harmless, if the verdict of the jury brings it within the first, or fraud, clause of the section. On the verdict, it is within this clause under the decisions of this court in *Johnson* v. *Worden*, 47 Vt. 457, and *Darling* v. *Woodward*, 54 Vt., 101.

In each of these cases the defendent had converted to his own use, without the consent of the plaintiff, property which was in his possession, but which he held under the contract between him and the plaintiff, as a collateral security for a debt which he owed the plaintiff. In *Johnson* v. *Worden*, the property, thus held and converted, was a yoke of oxen conditionally sold by the plaintiff to the defendant; and, in *Darling* v. *Woodward*, the property was twenty-nine sheep, of which the defendant had given the plaintiff a bill of sale as collateral security for signing a bank note.

Before the note was paid, the defendant, who had always retained possession of the sheep, sold them. The court held that the debts, thus created, were debts created by fraud, aud not discharged by the respective discharges of the defendants in bankruptcy. From the circumstances attending the transactions in both cases, it may be well inferred that the defendants intended no wrong to the plaintiffs by such sales, further than what arises from the sales, but supposed they should be able to meet the indebtedness for the payment of which the property was pledged,

when it became due. But each was guilty of converting or using property which, as between him and the plaintiff, he had no right to use in that way and such use operated to deprive the plaintiff of his right thereto. No debt, in regard to such sheep or oxen, existed between the respective parties to the suits until such sale and conversion of the property by the defendant. The debts thereby created were held to have been created by active fraud. In the case at bar, the money collected was the money of the plaintiffs. The defendant, under the instruction found to have been given by the plaintiffs by the verdict of the jury, had no moral nor legal right to use the money. His duty was that of a Bailee without hire to keep it. While he discharged this duty he was not the debtor of the plaintiffs in respect to the money. He only became their debtor when he wrongfully used the money. By using it, although he then intended to repay it to the plaintiffs, and felt that he was fully able to do so, he wrongfully deprived the plaintiffs of their property, and subjected them, by his voluntary, intentional act, to the liability of losing the same. He substituted his individual ability to respond in damages for property which belonged to the plaintiffs. Standing in the same relation to the money which the defendants in *Johnson* v. *Worden* and *Darling* v. *Woodward, supra*, did to the oxen and sheep, he, like them, wrongfully and intentionally used the property intrusted to him to the detriment and loss of the plaintiffs. In principle, the case at bar cannot be distinguished from the cases just cited. The decisions in those cases control the decisions in this case. It is contended that inasmuch as the exceptions state "there was no evidence tending to show any actual fraud or any fraudulent intent in the defendant's mingling the money with his own and using it, that no actual fraud can be found in the transaction. But this statement follows the statement that the defendant, on collecting the money, immediately mingled it with his own and used it. This of itself, as we have seen, was a wrongful and fraudulent act, which changed the relation of the defendant to the money from that of a bailee to that of a debtor. On the verdict, the debt thus created was not different in moral quality from that created by a

clerk who, without consent or authority, uses his employer's money, or of a treasurer of a corporation who, in like manner, uses the money of the corporation,—each, at the time, intending and honestly supposing they were, and should be, able shortly to return the same, but who by losses, perhaps arising in the use of the money, find themselves bankrupts, and so defaulters. On this construction of the exceptions it is not contended that the case of *Neal* v. *Clark* 96 U. S. 704, in which it is held that the fraud, to avoid the effect of the discharge in bankruptcy, must be *actual fraud*, in distinction from constructive fraud, is in conflict with the decisions of this court on that subject. The facts in *Neal v Clark* show a clear case of constructive, or implied fraud, involving no imputation of bad faith, moral turpitude, or intentional wrong. In the case at bar, there was bad faith, a betrayal by the defendant of the trust the plaintiffs had reposed in him, and an intentional act that was legally wrong. The debt thus created was not discharged by the defendant's composition with his creditors under the provisions of the Bankrupt Act of 1867.

The court properly excluded the offered evidence. The scope of that testimony was to show that, at that time the defendant committed the wrong and thereby created the debt, he honestly supposed that he was amply able financially to repair the wrong, but unexpectedly found that he could not do so. It did not tend to change in law, the character of the act out of which the debt arose.

The result is no error working injury is found in the trial and judgment of the County Court, and that judgment is affirmed.

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